UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

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ALVIN BALDUS, et al.,

Plaintiffs,

v. Civil Action No. 11-CV-562

MEMBERS OF THE WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD, et al.,

Defendants.

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**CIVIL L.R. 7(h) EXPEDITED NON-DISPOSITIVE MOTION OF NON-PARTIES WISCONSIN STATE SENATE AND WISCONSIN STATE ASSEMBLY TO QUASH THE SUBPOENA ISSUED TO JOSEPH HANDRICK**

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Non-parties, the Wisconsin State Senate, by its Majority Leader Scott L. Fitzgerald and the Wisconsin State Assembly, by its Speaker Jeff Fitzgerald, submit this Civil L.R. 7(h) Non-Dispositive Motion to Quash the Subpoena issued to Joe Handrick (McLeod Dec., Ex. 1). In the subpoena, Plaintiffs demanded that Mr. Handrick produce for inspection "any and all documents used by you or members of the Legislature to draw the 2011 redistricting maps enacted as Act 43 and Act 44," as well as appear for a deposition on December 1, 2011. Fed. R. Civ. P. 45 requires a court to quash a subpoena that "fails to allow a reasonable time to comply," "requires disclosure of privileged or other protected matter," or "subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(A). Plaintiffs' subpoena does all three and must be quashed.

**A. Discovery is Prohibitied Because Mr. Handrick is a Non-Testifying Expert.**

The State Senate and State Assembly retained Mr. Handrick in February 2011 as a consulting expert in the redistricting process in anticipation of litigation. In this capacity, Mr.

Handrick provided consulting services in connection with the undersigned firm's representation of the State Senate and State Assembly. As a retained, non-testifying expert, Mr. Handrick is not subject to discovery of any kind, whether by subpoena or otherwise. Fed. R. Civ. P. 26(b)(4)(D); *Ager v. Jane C. Stormont Hosp. & Training Ctr. for Nurses*, 622 F.2d 496, 501 (10th Cir. 1980).

**B. The Subpoena Seeks Information that is Privileged.**

Because Mr. Handrick was a non-testifying consultant, the subpoena seeks information that is privileged and thus not subject to discovery. Mr. Handrick assisted counsel for the Senate and Assembly in the provision of legal advice during the redistricting process. All communications between Mr. Handrick and/or the Senate and Assembly leadership on the one hand and legal counsel on the other are privileged and not subject to production. **Rule 45(c)(3)(A)(iii)** requires this Court to quash the subpoena on this ground.

**C. The Subpoena was Served Three Days Before the Date for Compliance.**

Even if the blanket protections of Rule 26(b)(4) did not completely shield Mr. Handrick from discovery, the subpoena still is improper for several additional, independent reasons.

First, the subpoena violates **Rule 45(c)(3)(A)(i)** and thus must be quashed because it allowed only three days to comply – a wholly unreasonable time. The subpoena was served on November 28, 2011, and demanded compliance by December 1, 2011. (McLeod Dec. Ex. 1).

**D. The Subpoena Does not Specify the Method of Recording Testimony.**

**Rule 45(a)(1)(B)** provides that "[a] subpoena commanding attendance at a deposition must state the method for recording the testimony." The subpoena does not do so. As such, the subpoena is invalid on its face.

**E. The Subpoena is Overbroad and Does not Specify the Documents Sought.**

The subpoena is vastly overbroad on its face in that it demands, without limitation, all

documents "used by you or members of the Legislature to draw the 2011 redistricting maps enacted as Act 43 and Act 44." The subpoena makes no attempt to specifically identify particular documents; it merely demands the entire files of every member of the Legislature. A blanket, all-encompassing subpoena such as this one is improper. *See Linder v. Calero-Portcarrero*, 180 F.R.D. 168, 174-75 (D.D.C. 1998). The subpoena also clearly seeks information that is outside of Mr. Handrick's possession or control. As an unelected, outside consultant, Mr. Handrick does not have control or custody over "documents used by . . . members of the Legislature." *See Outside the Box Innovations, LLC v. Travel Caddy, Inc.*, 455 F. Supp. 2d 1374, 378 (N.D. Ga. 2006). As such, Mr. Handrick cannot be compelled to produce them. **Rule 45(c)(3)(A)(iv)** requires that this Court quash the subpoena on this ground.

**E. The Discovery Sought from Mr. Handrick is not Relevant to the Dispute.**

Finally, the discovery sought from Mr. Handrick simply is not relevant to any of the claims or issues in this matter. At issue in the litigation is whether the resulting redistricting maps are constitutional. How the Legislature arrived at the final product is legally immaterial. The intent of any given participant in the process is immaterial. *See South Carolina Educ. Assn v. Campbell*, 883 F.2d 1251, 1257-58 (4th Cir. 1989) ("The Supreme Court has long recognized that judicial inquiries into legislative motivation are to be avoided.") Mr. Handrick is even further removed: he is an outside consultant who assisted counsel for the Senate and Assembly in connection with providing legal advice on matters relating to the reapportionment of the Wisconsin Senate, Assembly, and Congressional districts arising out of the 2010 census. Since the actions or intent of individual legislators are irrelevant to the constitutional validity of Acts 43 and 44, those of an outside consultant are all the more immaterial. To the extent the

legislative process has any relevance, the legislative file and record, including committee testimony, are matters of public record and obtainable without a subpoena.

Plaintiffs have violated their duty to "take reasonable steps to avoid imposing undue burden or expense" on a responding party. Consequently, the Court "must . . . impose an appropriate sanction" on Plaintiffs or their counsel. Rule 45(c)(1). Non-party respondents respectfully request an award of attorneys' fees incurred in preparing this motion.

Dated this 30th day of November, 2011.

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